92-636

Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States

October Term, 1992

CONNIE B. DILLNER,

Petitioner,

v.

RICHARD A. SODEN,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR WRIT OF CERTIORARI

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October 7, 1992

QUESTIONS PRESENTED

The Kansas Expedited Child Support Enforcement Statues authorize the promulgation of rules for the enforcement and modification of child support orders. The questions presented are:

1. Does due process allow the State of Kansas to delegate to an Administrative Hearing Officer full power to hear or decide child support controversies without providing litigants either recording or transcribing the hearing for appeal purposes?

2. If so, can the State of Kansas deny *de novo* review of such decisions by a judge, as is allowed other civil litigants?

3. May the State of Kansas require child support litigants to pay for court reporters when all other civil litigants are not required?

PARTIES TO THE PROCEEDING

All parties to the proceeding appear in the caption of the case except for the District Court Trustee:

Danny Vopat, Esq.
District Court Trustee
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(913)291-4090

Pursuant to Rule 29.4(c), 28 U.S.C. § 2403(b) may be applicable. Service of the petition shall also be made upon the Kansas Attorney General:

Robert Stephan
Kansas Attorney General
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Petition For Writ Of Certiorari To
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Kansas.

OPINIONS DELIVERED BELOW

The opinion of the Kansas Supreme Court (Appendix A, infra at a1) is reported at 251 Kan. 225, 834 P.2d 358 (1992). The Order denying rehearing is as of yet unreported. The memorandum decisions and orders of the District Court of Shawnee County, Kansas, (Appendix B, infra at b1) are unreported. The hand written decisions of the Administrative Hearing Officer (Appendix B, infra at b6) are unreported.

JURISDICTION

Petitioner seeks review of the Kansas Supreme Court judgment entered on May 22, 1992, upholding the constitutionality of K.S.A. (1991 supp.) 20-164 and review of the Kansas Supreme Court ruling of July 10, 1992 denying petitioner's motion for rehearing. This petition is filed within the ninety (90) day period provided by Supreme Court Rule

13.4. 28 U.S.C. Section 1257(a) confers jurisdiction to review the judgment by Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The 14th Amendment of the United States Constitution provides in pertinent part:

> All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No states shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In accordance with Supreme Court rule 14.1(f) the text of the pertinent provisions of Federal and Kansas statutes and regulations are set forth in Appendix

D. Said statutes and regulations are as follows:

45 C.F.R. § 303.101, et. seq.
K.S.A. (1991 supp.) 20-164
K.S.A. 20-302b(c)
K.S.A. 60-104
K.S.A. 60-243
Kansas Supreme Court Rule 172
Shawnee County Local Rule 3.401(8)
Shawnee County Local Rule 4.05
Shawnee County Local Rule 4.07
Shawnee County Family Law Guidelines

STATEMENT OF THE CASE

This case raises the question of whether the expedited child support enforcement procedures instituted by the State of Kansas and the Third Judicial District (Shawnee County) violate the Fourteenth Amendment to the United States Constitution. Petitioner asks this Court to determine whether due process requires a hearing on the record without request or a *de novo* review by regular judicial

procedures before child support due from one spouse to another can be reduced.

K.S.A. (1991 supp.) 20-164 authorized the Kansas Supreme Court to establish by rule an expedited judicial child support modification and enforcement process. Subsequently adopted Rule 172 provided for expedited judicial process. It stated:

> (a) The administrative judge in each district shall provide for an expedited judicial process which will increase effectiveness in support, visitation and parentage proceedings by appointing one or more judges or court trustees to preside as hearing officers at summary hearings relating to the establishment, modification, or enforcement of support pursuant to the Kansas Parentage Act . . . and enforcement of parent visitation rights.
>
> . . .
>
> (g) Decisions of district magistrate judges or court trustees appointed pursuant to this rule shall be subject to review by an associate district judge or district judge on the motion of any party filed

> within 10 days after the order was entered.

K.S.A. (1991 supp.) 20-302b(c) provided:

> . . . any appeal . . . of a district magistrate judge shall be tried and determined *de novo* by a district judge, except that in civil cases where a records was made of the action or proceeding before the district magistrate judge, the appeal shall be tried and determined on the record by a district judge[1].

In Shawnee County, Local Rule 3.401(8) states:

> (a) Expedited Judicial Process. . . . A deputy court trustee shall be appointed by the Administrative Judge and designated as the hearing officer for summary hearings relative to the establishment, modification or enforcement of child support orders and visitation rights. The hearing officer shall be vested with all of the authority and shall be subject to the limitations of Rule 172.

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1 See *In re Interest of K.J.*, 12 Kan.App.2d 188, 737 P.2d 874 [1987]; and *State v. Wilson*, 15 Kan.App.2d 308, 808 P.2d 434 [1991].

> . . .
>
> (c) Hearing Officer Powers. Matters cognizable by the hearing officer shall include motions to establish or modify child support. . . .
>
> . . .
>
> (g) Judicial Review. All orders issued by the hearing officer shall be subject to judicial review on the written motion of any party filed within ten (10) days after the order is filed with the clerk. If no motion is filed within ten (10) days objecting to the hearing officer's order, it shall be deemed a final order of the district court.

Shawnee County also adopted family law guidelines relating to post judgment child support modification motions. These established the procedure before an Administrative Hearing Officer (hereinafter AHO) to be informal in nature and generally expected to last one-half hour. These provide for judicial review as follows:

> Each party shall have ten (10) days from the filing of the

> order of the Administrative Hearing Officer to file a Motion for Judicial Review. The District Judge assigned to domestic matters will review the Administrative Hearing Officer's decision and may affirm the decision or grant a rehearing on the motion before a District Judge. . . .

Petitioner is a post-judgment recipient of child support whose former husband sought to reduce an agreed upon level of child support for three children of $1,350 a month to $582 a month.

Petitioner and respondent were married almost 18 years. Three children were born to the marriage. During the marriage from 1974 forward Richard Soden worked two jobs. His then wife, Connie Soden, now Connie Dillner (hereinafter "Connie Dillner"), had polio as a child on her right side and back and could not stand for any length of time. She was a secretary, but developed carpel tunnel

syndrome. She had surgery which was unsuccessful. She has arthritis in her left hand. She can no longer type and do much with her left hand. (Vol. I, pp. 99, 198; Exh. 21; Vol. II, p. 6; Dillner Depo. pp. 52, 69.) Prior to divorce in 1988 Mr. Soden earned $61,316. Connie Dillner was not regularly employed outside the home.

On March 8, 1989, Mr. Soden filed for divorce. On May 23, 1989, the parties entered into a property settlement agreement. Connie was not then represented by counsel. The property settlement agreement provided that Soden would pay alimony of $450 a month from May to October 1989 and $150 per month from November 1989 through September 1990, a total of $4,050.

Respondent Soden agreed to pay child support of $1,350 to May 1993, $900 per month from June 1993 to May 1995 and $450

per month from June 1995 through May 1997.[2] (Vol. I, p. 35.). Petitioner Dillner testified she would not have entered into the property settlement agreement and would not have accepted such reduced alimony unless she was convinced Respondent Soden would pay child support as per the property settlement agreement. (Vol. I, pp. 100, 199; Dillner Depo. pp. 70, 83.).

The agreed child support was below then Shawnee County guidelines. If Soden had earned only $4,000 monthly, child support would be $1,350 monthly, as agreed. (Vol. I, pp. 99; Vol. II, p. 9). In 1989, he earned $66,508. In 1990, he earned $61,628. (Vol. I, p. 6.) On February 1, 1991, Soden filed a *pro se* motion to reduce child support and filed

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2 These agreed upon reductions corresponded to ages the children were to be emancipated.

a domestic relations affidavit indicating he earned $5,202 monthly. Connie Dillner then had earnings of approximately $627 a month. Soden threatened to quit his employment for six months if he had to continue to pay the high child support. In fact the evidence showed he made $5,962.20 in February. (Vol. I, p. 198; Soden Depo. pp. 12, 17.)

In February 1991, the child support was still below guidelines. (Vol. I, p. 99; Vol. II, p. 9). Because all Shawnee County child support matters went to the AHO regardless of complexity, Cf., 45 CFR § 303.101(b)(4), Petitioner Dillner and Respondent Soden each took the deposition of the other.

On April 16, 1991, the parties appeared before the AHO, who allegedly considered their brief testimony, subpoenaed business records, the depositions, and

arguments. Dillner objected to the hearing process which denied opportunity for *de novo* review. See AHO's hand-written notes, in typewritten form at Appendix "B", infra at b6, 17.

The AHO found Soden's average monthly gross income was $3,000 (estimated) and the respondent's average monthly gross income is $700 (imputed). On May 15, 1991, the AHO reduced Soden's child support to $862 per month effective May 5, 1991.

On May 24, 1991, Dillner timely filed a petition for judicial review. (Vol. I, p. 98-122). Dillner requested the opportunity to present evidence under "principles of due process, equal protection and remedy by due course of rights to a hearing on the record". The trial court granted the petition for review and stated:

> The court has scheduled 30 minutes for argument on appeal. No evidence not presented to A.H.O. will be considered.

(Appendix "B" at b5).

The trial court granted petitions for review in a very low percentage of cases.

Soden had told the AHO he would fall asleep on the way home from work. Dillner, on the petition for review, subpoenaed Soden's supervisor, a Mr. Hunter. Mr. Hunter would have testified Mr. Soden never told him he fell asleep driving home from work. It was Mr. Hunter's impression Mr. Soden was seeking to reduce his hours to reduce child support. (Vol. I, p. 178.)

The parties appeared before the trial court. Dillner again objected to the court's proceeding denying remedy by due course of law; that she was denied due process by not having a full hearing

on the record; and that she was denied equal protection. (Vol. II, p. 4.) The trial court stated the Kansas Supreme Court allows it to appoint an AHO and has essentially made it an administrative hearing process and "you are not entitled to a full blown adversary hearing in setting child support and I will so rule and you've made your record." (Vol. II, p. 4.)

Dillner provided the trial court with a brief and proffer regarding the supervisor, Mr. Hunter's, testimony. (Vol. I, p. 198.)

The trial court refused to allow his testimony and stated:

> Not only for the purpose of the record, but for counsels' further edification. You're entitled to a hearing on child support, I think under that rule, and you get your hearing before the Administrative Hearing Officer and I don't intend to have child support modification issues piecemealed. You present everything you've got

> before the Administrative Hearing Officer and the matter gets heard then. And then it's brought up here. I don't intend to let someone piecemeal their case and put part of there and think "Well, we'll get a full-blown hearing in front of the District Judge," because you're not going to do it until the Supreme Court tells me to the contrary. I can just tell you.

On June 27, 1991, the trial court ruled the AHO's order modifying child support would not be effective until June, 1991, but in all other respects denied the petition for review and affirmed the AHO. (Appendix "B" at b1). It indicated respondent had been afforded the opportunity to a full hearing before the AHO. (Vol. I, p. 203.)

On July 29, 1991, the matter was journalized. On August 7, 1991, appeal was timely filed raising the above constitutional questions. On May 22, 1992, the Kansas Supreme Court affirmed the trial court's decision, holding that

although the Constitutional questions were properly raised, (Appendix "A", a18 - a19, Dillner's Due Process and Equal Protection rights were not violated, and that the provisions set forth in Kansas statutes and regulations afforded her the opportunity to be heard at a meaningful time and in a meaningful manner. (Appendix "A", at a17 - a36). Dillner timely filed a motion for rehearing which was denied on July 10, 1992.

REASONS FOR ALLOWING THE WRIT

This case presents an important and reoccurring question with far reaching impact due to federal regulations within the Federal Child Support Enforcement Amendments: Does due process and equal protection require a hearing on the record without request or a *de novo* review by established judicial process in post-judgment child support matters?

State Courts of last resort have delivered conflicting opinions and further divergence is likely. Therefore, review on writ of certiorari is necessary to resolve the existing conflict and to provide authoritative guidance to all states who labor under federally mandated regulations.

I. THE FEDERAL QUESTION PRESENTED SHOULD BE RESOLVED BY THIS COURT TO PROVIDE AUTHORITATIVE GUIDANCE TO ALL STATES OF THE UNION

A. The Opinion Below Conflicts With Decisions of Other State Courts of Last Resort

The federal government has mandated that the states institute expedited child support enforcement processes which include the following:

> (1) taking testimony and establishing a record. 45 C.F.R. § 303.101(d)(1).[3]

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3 The administrative hearing must be a hearing of record. See Melli,

The federal regulations contain several provisions related to due process protections for the parties. These include requirements that:

> (2) the due process rights of the parties involved must be protected. 45 C.F.R. § 303.101(c)(2).
>
> . . . . .
>
> (6) action taken may be reviewed under the state's generally applicable judicial procedures. 45 C.F.R. § 303.101(c)(6).

Commentators are nearly unanimous as to the fundamental requirements of due process protection. See, Melli, Stanton and Haynes, Alimony, Child Support & Counsel Fees -- Award, Modification & Enforcement, § 17.03, pp. 17-8 - 17-17; U.S. Dept. of Health and Human Services,

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Stanton and Haynes, Alimony, Child Support & Counsel Fees -- Award, Modification & Enforcement, § 17.03, pp. 17-8 - 17-17; See also *Allen v. Allen*, 132 Kan. 468, 295 Pac. 705 (1931); *Fly v. Fly*, 590 S.W.2d 179 (Tex. Civ. App. 1979).

A Guide for Judges in Child Support Enforcement, 2nd Ed., Chpt. 4, pp. 35-50.

The Kansas Supreme Court below found no violation of constitutional provisions for due process rights under the U.S. Constitution. The Court's holding in this case directly conflicts with the Nebraska Supreme Court in ***Drennen v. Drennen***, 229 Neb. 204, 426 N.W.2d 252 (1988). In ***Drennen,*** the Nebraska Supreme Court dealt with an expedited hearing process granting a referee the power to, *inter alia*, establish, modify, enforce and collect child support. The Nebraska Court referred to its constitution, Article I, Section 13, which provided:

> All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and justice administered without denial or delay.

The Nebraska Supreme Court held the law violated this remedy by due course of

law provision, as well as the Equal Protection Clause of the United States Constitution. 426 N.W. 2d at 260.

Nebraska even provided for referees to preserve testimony by tape recordings, and make decisions which became the judgement of the district court if a petition for review was not filed within 15 days. Neb. Rev. Stat. § 43-1602. This, as will be seen below, provides much more due process safeguards than Kansas procedure. Despite these provisions, the Nebraska Supreme Court, apparently recognizing the wisdom of the policy of citizens having access to the courts, not to administrative referees or hearing officers, held the mandatory Nebraska procedures unconstitutional.

B. Review by This Court on Writ of Certiorari is Necessary Because the Kansas Supreme Court Has Decided An Important

Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

In view of constraints upon the jurisdiction of federal courts imposed by the Eleventh Amendment to the United States Constitution and considerations of the doctrines of comity and abstention, constitutional challenges to state laws regulating family matters must ordinarily be pursued through state courts. Domestic relations law is not ordinarily a federal law question. See ***Chrissy F. v. Mississippi Dept. of Public Welfare***, S.D. Miss., Dec. 9, 1991, No. J88-0340B. Consequently, a writ of certiorari from this Court is the only available means to resolve decisional conflicts between State Supreme Courts in cases involving federally protected rights.

Petitioner further contends that certiorari is appropriate under two different theories. First, that the expedited process denies due process; second, that it violates her equal protection rights.

1. Due Process

Authoritative guidance from this Court is necessary to avoid further state conflicts regarding the due process requirements of expedited judicial processes in child support cases. If the opinion below is allowed to stand, other state courts may be encouraged to limit court access for spouses and children, in exchange for considerations of expediency and judicial economy. The result of such rulings would impact thousands or even hundreds of thousands of children across the nation.[4] For instance, in 1987

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4 For instance, in 1990 nearly four billion dollars was collected pursu-

812,661 support orders were entered and 286,766 paternities were established.[5]

Due process is guaranteed by the Fourteenth Amendment of the United States Constitution. While difficult, if not impossible to define, due process of law means law in the regular course of administration through courts of justice according to those rules and forms which have been established for the protection of private rights. *State v. Jack*, 69 Kan. 387, 76 Pac. 941 (1904), *aff'd* 199 U.S. 372 (1906).

This Court held in *Goldberg v. Kelly*, 397 U.S. 254 (1970), that an administrative agency must follow due

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ant to Federal Child Support legislation. H. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 Family Law Quarterly 1, 5 (1990).

5 Twelfth Annual Child Support Report, Office Child Support Enforcement, August 1988, at 3.

process. This decision has resulted in a due process "explosion". See, J. Mashaw, *Due Process in the Administrative State* 9, nn. 22,23 (1985) (federal court complaints of procedural due process deprivation in the 1970's showed a 350 percent increase over the 1960's). As a result of the increase in litigation, Courts are continually searching new ways to stem the tide and balance the interests of litigants and judicial efficiency. The recent additional strain of recession and revenue shortfalls has put more pressure on courts to economize. These strategies range from improving technologies[6], to implementing "user fees" for court services[7].

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6 C. Nihan and R. Wheeler, *Using Technology to Improve the Administration of Justice in the Federal Courts*, 1981 B.Y.U. Law. Rev. 659

7 D. Bresnick, *User Fees for the Courts: An Old Approach to a New*

Another aspect of the increasing case load is the greater emphasis on alternative methods of dispute resolution. The creation of expedited child support enforcement processes like the one at issue are part of the direct progeny of *Goldberg*. However, while the domestic relations docket may be crowded and while courts have an obligation to administer justice without delay, litigants are entitled to sufficient time to make an orderly presentation of their case and all relevant facts must be capable of being fully explored before a judge with a court reporter or official recorder present. While expense issues must be considered, it does not justify denying a hearing meeting ordinary due process standards. ***Kelly v. Wyman***, 294 F.Supp. 893,901 (S.D.N.Y. 1968), *aff'd*,

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Problem, 7 The Justice System Journal, pp. 34-43 (Spring, 1982)

Goldberg v. Kelly, 397 U.S. 254 (1970). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner". *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Petitioner Dillner contends this includes a hearing on the record at some level should an appeal be deemed necessary. Certiorari should be granted to resolve, in light of the wholesale restructuring of the expedited child support enforcement process, what form of due process hearing is required where a state attempts to modify traditional access to judicial process.

It is a truism that "some form of hearing" is required before one is deprived of a protected property interest. *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972). The question for

this Court is what "some form" means. The nature of the required hearing depends on appropriate accommodation of the competing interests involved. *Goss v. Lopez*, 419 U.S. 565, 579 (1975). These include (1) the importance of the private interest, (2) the length or finality of the deprivation, (3) the likelihood of governmental error, and (4) the magnitude of governmental interests involved. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). Application of these factors to this case reveal the necessity for review.

First, the private interest involved is substantial. This case involves child support modification, an issue affecting many single parent's economic survival. This Court has held that matters involving the family unit involve fundamental interest subject to strict scrutiny. E.g., *Zablocki v. Redhail*, 434 U.S. 374,

383-386 (1978) (Child rearing and family relationships are fundamental interests deserving of critical examination of state interests in making classifications).

Second, the deprivation of this interest is in all practicality a final deprivation. Although child support is always subject to review, modification in this and most jurisdictions is only subject to changed circumstances substantial in scope. See, e.g. K.S.A. 60-1610(a)(1).[8]

Third, the likelihood of governmental error is great. Here the

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8 Kansas courts may modify any prior order when a material change in circumstances is shown (*Hill v. Hill*, 228 Kan. 680, 685, 620 P.2d 114 (1980)). See also, Kansas Administrative Rule 75 [10% deviation in support required by guidelines]; Shawnee County Rule 4.07 (announcing a policy limiting *pro se* litigants to one child support modification hearing per year).

decision is relegated to an administrative hearing officer, not a judge. Petitioner contends the courts may not delegate their judicial authority. See *Drennen v. Drennen*, *supra.*; *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Groner v. Groner*, 328 Pa. Super. 191, 476 A.2d 957 (1984); and *Rea v. Rea*, 195 Or. 252, 245 P.2d 884 (1952).

The hearings are "encouraged" to last thirty minutes or less. The record is limited to the AHO's notes and whatever exhibits are introduced. The trial court has stated judicial review will not be granted except in extraordinary cases. Here the trial court would allow no more than one-half hour of argument. While a rule of reason applies, the trial court cannot unduly restrict an individual's right to make a record. While trial courts may limit the time for presentation of opening and

closing arguments and may cap the number of expert and lay witnesses who might present cumulative evidence in order to conserve court time, they may not deny any litigant their right to a full, fair and adequate hearing. Many decisions in civil and domestic cases have reversed the trial court's prejudicial conduct in unreasonably limiting the time in which a litigant must present their case. E.g., *Lisiten v. Lisiten*, 30 Colo. App. 357, 492 P.2d 895 (Colo. App. 1972); *Barr v. Barr*, 235 Pa. Super. 9, 331 A.2d 774 (1974); *Abbe v. Abbe*, 475 So.2d 206 (Fla. 1985); *Malfi v. Malfi*, 102 A.D.2d 814, 476 N.Y.S.2d 599 (1984); *In Re Marriage of Goellner*, 770 P.2d 1387 (Colo. App. 1989).

Similarly, limitations to presenting witnesses has resulted in reversal. *Fuhrman v. Fuhrman*, 254 N.W.2d 97 (N.D.

1977); *In Re Marriage of Giamerino*, 81 Ill.App.3d 998, 401 N.E.2d 1048 (1980).

Fourth, the governmental interests involved in depriving Dillner of full judicial review are insubstantial. Expediency is a factor, but not dispositive. See, *Logan v. Zimmerman Brush Co.*, 455 U.S. at 441 (J. Blackmun, concurring). Indeed, Shawnee County has recently modified its child support guidelines (after this case) in a futile attempt to remedy the problems which this case raised. The 1992 Rule 4.05 of the Family Law Guidelines notes:

> "A stenographic record is not provided in proceedings before the AHO. The record will consist of the Hearing Officer's findings, order and any exhibits presented. If counsel wish a stenographic record of the proceedings before the Hearing Officer, they should retain a court reporter."

Although the changes are minor and do not remedy the Constitutional defects, the modification evinces a implicit recognition that the state interests are insubstantial. Additionally, the adversarial determination of child support is not a matter historically relegated to administrative decision makers.

It is possible the Kansas Supreme Court was beguiled by the notion of an inexpensive, expeditious resolution of a perceived problem area of child support modification, the lack of consistency in court decisions. While there was nationwide evidence of disparate variations in child support, in Kansas the variations in support levels was modest among judges and due primarily to income differences, the presence of spousal maintenance, the number of children, and the type of custody awarded. A. Hoyt, *Child Support*

Awards: An Analysis of Judicial Discretion in Divorce Cases in Kansas (Ph.D. dissertation, Kansas State Univ. 1984). However, that desire for inexpensive, expeditious child support modification will flounder if the parties are required to retain and pay for court reporters as the new Shawnee County guidelines now provide.

The Kansas and Shawnee County rules are in part based upon the Federal Child Support Enforcement Amendments which regulate child support orders for AFDC recipients and clients for whom the IV-D Agency provides services. 42 U.S.C. § 666 et. seq. This law and its accompanying federal regulations require that all states adopt "expedited processes" to enforce child support orders while still protecting due process rights of the parties and providing for judicial review.

42 U.S.C. § 666(a)(2); and 45 C.F.R. §303.101.[9]

The term "expedited processes" is defined in the federal regulations as administrative or expedited judicial process in which the presiding officer is not a judge of the court. 45 C.F.R. § 303.101(a) (10-1-87 ed.). Neither the Congressional legislation nor the federal regulations mandate any specific procedure to satisfy the requirement of expedited processes. It is clear, however, that either an administrative process or a quasi-judicial process will qualify.

The federal regulations do spell out certain features which must be included. The functions performed by the presiding

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9 Kansas has recognized the federal administrative regulations apply. *In Re Marriage of Schletzbaum*, 15 Kan.App.2d 504, 506, 809 P.2d 1251 (1991).

officers under the expedited process must at least include the following:

(1) taking testimony and establishing a record. 45 C.F.R. § 303.101(d)(1).[10]

(2) a requirement in the regulations that "the due process rights of the parties involved must be protected;" 45 C.F.R. § 303.101(c)(2).

(3) a provision that action taken "may be reviewed under the state's generally applicable judicial procedures; 45 C.F.R. § 303.101(c)(6)[11].

By statute, most states with quasi-judicial proceedings provide for *de novo* review of these quasi-judicial systems.

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10 The administrative hearing must be a hearing of record. See Melli, Stanton and Haynes, Alimony Child Support - Counsel Fees -- Award, Modification & Enforcement, § 17.03, pp. 17-8 - 17-17. See also, ***Allen v. Allen***, 132 Kan. 468, 295 P. 705 (1931); ***Fly v. Fly***, 590 S.W.2d 179 (Tex. Civ. App. 1979).

11 See also, Melli, Stanton and Haynes, Alimony, Child Support & Counsel Fees Award, Modification & Enforcement, § 17.03, pp. 17-8 - 17-17.

Delaware statutes provide for the appointment of a family court master who makes findings and recommendations in writing which become the judgment of the court if a *de novo* hearing before the judge is not requested within ten days or the Chief Judge does not disapprove the order in writing. 10 Del. C. § 913 (1990 supp.).

Michigan provides for referees to expedite the entry and enforcement of child support orders. They make statements of findings and recommended orders. The parties are entitled to a *de novo* hearing on application within 21 days of the referee's recommendation. M.S.A. §25.176(7).

Nebraska statutes provide for referees to preserve testimony by tape recordings and make decisions which become the judgment of the district court

if a petition for review is not filed within 15 days. R.R.S. § 43-1602.[12]

Pennsylvania provides for hearing officers who confer with the parties and counsel. The Pennsylvania court may enter a support order without a hearing, subject to review *de novo* upon written request within 10 days, or it may defer action, in which case a court hearing automatically follows. Pa.R.C.P. No. 1910.11(i), 42 Pa.C.S.A. (1992 supp.).

In Wisconsin a family court commissioner can set support pending divorce and revise support orders. There parties are entitled to appeal to the court and, if they request, are entitled to a *de novo* hearing. W.S.A. § 767.13(2)(b)(6) (1991 supp.).[13]

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12 These were, as earlier indicated, held unconstitutional in ***Drennan v. Drennan***, *supra*.

13 See generally, Melli, Stanton & Haynes, supra. at 17-11 - 17-14.

In these states the parties are entitled to a *de novo* judicial review. It is error not to grant *de novo* judicial review. See, ***Groner v. Groner***, 328 Pa. Super. 191, 476 A.2d 957 [1984]; ***Parker v. Parker***, 538 So.2d 37 (La. App. 1990) (In child support arrearage proceedings, the trial judge was required to review trial transcript and render a *de novo* finding of disputed fact); and ***Stach v. Stach***, 83 Md. App. 36, 573 A.2d 409 (1990).) See also, U.S. Dept. Health and Human Services, *A Guide for Judges in Child Support Enforcement*, 2nd Edition, Chapter 4, pp. 35-50. Petitioner has found no state which provides a quasi-judicial hearing as does Kansas which does not require *de novo* review.

This Court has not addressed the issue of what due process requirements are necessary in child support modification hearings. However, in ***McNary v.***

Haitian Refugee Center, 498 U.S. ___, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991), this Court upheld the traditional remedy of judicial review in the case of a challenge to certain administrative procedures instituted by the Immigration and Naturalization Service.

The Immigration Reform and Control Act of 1986 created an amnesty program for specified aliens. Section 201(e)(1) barred judicial review of application determinations except in the context of a deportation order, and then review was obtainable only in the Court of Appeals. This Court held the provisions denied due process. Central to this Court's holding was that the inadequate administrative level record effectively barred adequate judicial review.

> Initially, administrative or judicial review of an agency decision is almost always confined to the record made in the proceeding at the initial

> decision making level, and one of the central attacks on INS procedures in this litigation is based on the claim that such procedures not allow applicants to assemble adequate records. As the District Court found, because of the lack of recordings or transcripts of LO interviews and the inadequate opportunity for SAW applicants to call witnesses or present other evidence on their behalf, the administrative appeals unit of the INS, in reviewing the decisions....and the courts of appeals, in reviewing SAW denials in the context of deportation proceedings, have no complete or meaningful basis upon which to review application determinations.

112 L.Ed.2d at 1020. Petitioner contends certiorari should be granted to answer the related question of whether assigning a child support case to an administrative hearing officer to hear cases that are effectively limited to thirty minutes, not transcribed by a court reporter or having other transcription available, and where neither judicial review on the record or *de novo* hearing is provided

comports with due process. The Shawnee County AHO's "record" is generally notes written into blanks on a two page order. There are a few lines to cover "non-routine" matters. There is also a one page form with twelve blank lines for notes. The summary record notes which the trial court reviewed (which have been retyped in accordance with Rule 33) is set forth at Appendix B. Even if better notes were taken, most disturbing is that appeals to the trial court will be decided upon the administrative hearing officer's handwritten notes, who in Shawnee County is a staff member of the trustee's office, frequently a party in child support modifications.

2. Equal Protection

Petitioner respectfully contends this Court should grant certiorari to determine whether the expedited child

support enforcement modification process violates the Equal Protection Clause of the Fourteenth Amendment. These guarantees require all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. As noted above, the interests of a family receiving child support are fundamental rights which, when subject to classification by the state, are accorded strict scrutiny. Kansas impermissibly denies fundamental protections to parties receiving or paying child support that are routinely granted to all other civil litigants.

First, the Kansas Supreme Court ostensibly held one is not entitled as a matter of right to have the hearings transcribed by a court reporter, unless it is provided at the litigant's expense. However, in other civil proceedings a

court reporter is provided by law. See, K.S.A. 60-104; K.S.A. 60-243.

In Kansas criminal trials, pleas, and instructions conferences are on the record. K.S.A. 22-3210 and 22-3414(3). If there is a criminal procedure where a record is optional, such as a preliminary hearing, a specific statute places the parties on notice. K.S.A. 22-2904.

The trial court made the comparison (to which petitioner disagrees) of the expedited child support enforcement process to an administrative process. However, if the trial court was correct, there should be a record of the hearing without request. K.S.A. 77-524(e), the Kansas Administrative Procedure statute, provides:

> The presiding officer shall cause the hearing to be recorded at the state agency's expense.

(Emphasis added).

In matters before administrative agencies, Judge Henry Friendly of the Second Circuit Court of Appeals included having a record of the proceeding and availability of judicial review as elements of the basic requirement of due process. (H. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1279-1295 (1975); See also E. Re, *Due Process, Timely Judicial Review, and the Rights of the Individual*, 39 Clev. St. L. Rev. 1, 8 (1991).

Where testimony is not recorded at the fact-finding level, Kansas has traditionally provided for *de novo* judicial review. K.S.A. (1991 supp.) 20-302b(c), the act creating the position of District Magistrate Judges, provides:

> (c) In accordance with the limitations and procedure prescribed by law, and subject to any rules of the supreme court relating thereto, any

> appeal permitted to be taken from an order or final decision of a district magistrate judge shall be tried and determined *de novo* by a district judge, except that in civil cases where a record was made of the action or proceeding before the district magistrate judge, the appeal shall be tried and determined on the record by a district judge.

(Emphasis added). Clearly, if the case had been tried before a district magistrate judge[14], the matter would be tried on the record (without any requirement of a party to make this request) or the matter would be tried *de novo* before the district court judge with the parties free to call such relevant witnesses as they believed necessary for the efficient presentation of their case regardless of whether the witness had testified before the magistrate judge.

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14 Instead of an AHO, both equivalent under Ks. Sup. Ct. Rule 172.

In *In Re Interest of K.J.*, 12 Kan. App.2d 188, 737 P.2d 874 (1987), the Kansas Court of Appeals noted,

> Historically, a *de novo* appeal to a district judge meant that the case was tried and determined as if it were originally filed for hearing before the district judge. Thus, any elicitation of evidence in the court of origin would be disregarded and the case would begin anew.
>
> With the unification of the court system and the technological advances which permit the creation of a record by tape records, 20-302b recognizes that it has become possible for a district judge to redetermine the issues of fact without a complete repetition of the trial already held. . .

Clearly, the court read the necessity of a court record before it waived the historic *de novo* trial exception. It did not create waiver issues due to the historic policy concerns about less trained individuals making judicial decisions. The Kansas Supreme Court affirmed

and adopted the Court of Appeals' opinion. *In Re Interest of K.J.*, 242 Kan. 418, 748 P.2d 419 (1988). See also *State v. Wilson*, 15 Kan. App.2d 308, 808 P.2d 434 (1991) (same rule in criminal cases).

Dillner further submits Kansas law requires a record without request and the only possible waiver applicable would be if she waived a record. Under the Kansas Supreme Court's pronouncement in all civil cases *except* the expedited judicial process a record is made without request.[15] There exists no federal regulation, legislative intent or court rule to support such a rationalization and the Kansas Supreme Court cited no authority in its opinion for the distinction.

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15 K.S.A. 60-104; K.S.A. 60-243.

24 Am Jur.2d, Divorce and Separation, § 330, p. 470, notes:

> "Generally, the practices and procedure in other civil actions govern the hearing or trial of divorce actions."

24 Am. Jur.2d, Divorce and Separation, § 793, p. 901 also notes as to child custody cases:

> ". . . the parties cannot be deprived of any of the usual attributes of a fair trial in open court, the award of custody must be based on evidence hearing in open court in observance of requirements due process of law, rather than on information obtained from a private investigation".

Modification of child support is a judicial function. Like all judicial functions it is performed in courts of record. The concept of an open court includes a duty on the court, not the parties, to provide court reporters. In *Fly v. Fly*, 590 S.W.2d 179 (Tex. Civ. App. 1979), it was held the court's duty

in husband's divorce suit requires a court reporter to be present for entire proceedings and to provide wife with statement of facts to which she was entitled. Where in a custody case a judge in a private, unreported conference between the judge and two children arrived at a temporary custody decision and denied the right to present further evidence, basic constitutional due process rights were held violated. ***Shaw v. Shaw***, 455 So.2d 1156 (Fla. App. 1984). See also ***Allen v. Allen***, 132 Kan. 468, 470, 472, 295 Pac. 705 (1937).

It should be noted that the Kansas Supreme Court, through a creative yet unusual feat of logic or appellate legerdemain, held that Dillner waived her right to a hearing on the record by not requesting a record even though no federal regulation, state law, state rule, local rule or even the existing

local guidelines provided a request should be made. (Appendix A, infra at a34). Although this decision would generally not be subject to a writ of certiorari, review is necessary in order to protect petitioner's due process and equal protection rights.

There can be no question petitioner wanted a hearing on the record. Petitioner clearly raised the issues at the start of the administrative proceedings and took depositions to perpetuate testimony. She attempted to make a record, knowing full well that the trial judge, who had been extensively involved in the promulgation of the expedited procedures, was not going to find his own judicial handicraft unconstitutional. When the parties appeared before the trial court, Dillner timely and properly objected to its expedited procedure denying remedy by due course of law, denying

due process by not allowing a full hearing on the record, and denying equal protection. She likewise referred to the other states' procedures. (Vol. II, p. 4.)

On appeal, the Kansas Supreme Court held the "hearing" occurs before the administrative hearing officer and affirmatively held "judicial review on the record is required", but a request must be made. (Appendix A, infra at a34). Even now the court's ruling in unclear, but its import is that Dillner, or any other litigant, must ask for a court reporter even though the new local rules clearly imply she is not entitled to one unless she pays for one. The Kansas Supreme Court stated:

> ". . . we hold that judicial review on the record is required. It thus follows that either an electronic or court reporter record must be requested at the hearing or the

> right to object to the lack of a record being made is waived."

The decision begs the fundamental question. Dillner did not waive her right to a *de novo* judicial hearing on the record by participating in an expedited administrative hearing without a record. Waiver is the intentional relinquishment of a known right. ***Stratmann v. Stratmann***, 6 Kan.App.2d 403, 410, 628 P.2d 1080 (1981). Dillner did not have the right to a hearing before the court reporter until the Kansas Supreme Court ruled that she did. It should be assumed one cannot waive an unknown right. Kansas cases had previously held silence was not a waiver. ***Johnson v. Johnson***, 11 Kan.App.2d 317, 321, 721 P.2d 290 (1986); and ***In re Gambrell***, 160 Kan. 620, 164 P.2d 122 (1945).

Even if the Kansas Supreme Court's pronouncement that an electronic or court reporter is required, but can be waived by not requesting a record stands, certiorari should be granted to state whether a litigant may constitutionally be required to pay for her own court reporter. Such an imposition is both violative of equal protection and the duty to provide access to the Courts. See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (Courts cannot deny indigents access to divorce courts with filing fees); *Little v. Streater*, 452 U.S. 1 (1981) (denial of due process for indigent defendants in paternity cases required to bear the cost of blood group tests if requesting them).

In order for the expedited procedures to comport with due process, they must provide one who has a property interest affected or deprived the

meaningful opportunity to present her case. The State of Kansas has denied petitioner due process by a two-pronged attack. First, it sanctions an administrative process that severely limits one's opportunity to be heard; second, it limits judicial review of the subsequent decision. The Kansas statute is the vanguard of future governmental restructuring of traditional judicial access. Certiorari should be granted to determine this procedure is not Constitutional.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the Supreme Court of the State of Kansas should be granted.

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APPENDICES

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 67,023

In the Matter of the Marriage of

RICHARD A. SODEN,
Appellee/cross-appellant,

and

CONNIE B. SODEN,
now CONNIE B. DILLNER,
Appellant/cross-appellee.

SYLLABUS BY THE COURT

1.

The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution.

2.

A statute is not to be invalidated

by the judicial arm of government if the challenged statute does not contravene significant constitutional or inherent rights of individuals, the classification on which it is based is reasonable, it is within the scope of the police powers of the State, and it is appropriately related to the proper purpose of such police power.

3.

"Remedy by due course of law," as used in § 18 of the Kansas Constitution Bill of Rights, means the reparation for injury ordered by a tribunal having jurisdiction in due course of procedure after a fair hearing.

4.

Basic elements of procedural due

process of law are notice and an opportunity to be heard at a meaningful time and in a meaningful manner.

5.

In challenging the constitutionality of a statute, the test for whether due process has been afforded is whether the legislation has a real and substantial relation to the objective sought, whether it is reasonable in relation to the subject, and whether it was adopted in the interest of the community.

6.

The concept of due process is flexible in that not all situations calling for procedural safeguards call for the same kind of procedure.

7.

Judicial review of the record taken

at an expedited judicial procedure hearing, pursuant to K.S.A. 1991 Supp. 20-164, is constitutional. It follows that either an electronic or Court reporter record must be requested at the hearing or the right to object to the lack of a record being made is waived.

8.

The standard of review for a trial court's affirmance of an administrative hearing officer's order reducing child support is the same as the standard of review for a trial court's modification of child support: abuse of discretion.

9.

Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only

where no reasonable person would take the view adopted by the trial court.

10.

Matters settled by an agreement incorporated in a divorce decree, other than matters pertaining to the custody, support, or education of the minor children, shall not be subject to subsequent modification by the court except: (1) as prescribed by the agreement or (2) as subsequently consented to by the parties.

11.

Child support orders may be reopened, changed, or modified as the children grow and their needs change, the economy changes, and the parents move, remarry, change jobs, or change their way of life.

Appeal from Shawnee district court;

JAMES P. BUCHELE, judge. Opinion filed May 22, 1992. Affirmed.

Robert E. Keeshan, of Hamilton, Peterson, Tipton & Keeshan, of Topeka, argued the cause and was on the briefs for appellant/cross-appellee.

Christel E. Marquardt, of Levy and Craig, P.C., of Kansas City, Missouri, argued the cause and was on the brief for appellee/cross-appellant.

Danny J. Vopat, of Topeka, was on the brief for *amicus curiae* Third Judicial District Court Trustee.

The opinion of the court was delivered by

ABBOTT, J.: This is an appeal by Connie B. Dillner, formerly Connie B. Soden, (Dillner) from the trial court's affirmance of the administrative hearing officer's order reducing child support

payments and other orders concerning support of the minor children. Her former husband, Richard A. Soden, (Soden) cross-appeals.

Most of Dillner's complaints center around the expedited judicial process used in this case; she also alleges the reduction of child support was in error. Soden's cross-appeal concerns the admissibility of evidence by the administrative hearing officer (AHO), a contention that Dillner's appeal was not filed timely, and allegations that Dillner failed to raise most of the issues at the trial court level. Both parties request attorney fees.

Dillner and Soden were divorced on May 26, 1989, after almost 20 years of marriage. Three children were born to the marriage. Soden was ordered to pay child support in the amount of $1,350 a month. Child support payments were to be

reduced $450 a month as each child reached majority.

Soden and Dillner entered into a property settlement agreement, which was incorporated into the divorce decree. As a part of that agreement, Soden and Dillner each pay $300 a month on a farm loan. Soden agreed to provide health insurance for the children. They were to divide equally all medical bills not covered by health insurance. Soden was given the right to claim the children as dependents for tax purposes. Other provisions were made in the property settlement agreement, and they will be set forth, if helpful, in deciding the issues.

At the time of the divorce, Soden was working two jobs, putting in 72 hours a week as a nurse. He had been working two jobs since 1974. Dillner formerly was employed as a secretary;

however, she developed carpal tunnel syndrome in her left hand. Because surgery failed to correct the problem, she is no longer able to type for a living. At the time of the divorce, Dillner was not employed "regularly" outside of the home. Shortly after the divorce, she was offered a contract to work as a full-time bus driver four hours daily during the school year.

Dillner continues to raise and board horses on the farm. When her deposition was taken, Dillner had four horses of her own, including a miniature horse, and boarded three others. Dillner takes care of the horses and treats their injuries.

On February 1, 1991, Soden filed a motion to reduce child support. He estimated his monthly income to be $5,202. Dillner estimated her monthly income to be $627. On March 29, 1991,

Soden filed an amended motion, informing the court he had reduced his work week to 40 hours and would earn $2,908 monthly.

The AHO conducted a hearing on Soden's motion. On May 9, 1991, the AHO reduced Soden's child support payment to $862. The AHO also ordered the following: Soden and Dillner were to share proportionately all future unreimbursed medical expenses. Dillner would now have the tax exemption for the middle child; Soden would retain the other two exemptions.

Dillner filed a petition for judicial review with the District Court of Shawnee County. The trial court granted review and notified the parties that the "[c]ourt has scheduled 30 minutes for argument on appeal. No evidence not presented to A.H.O. will be considered". After argument, the trial court notified the parties that the AHO

order was affirmed, with one modification. The order modifying support was not effective until June 1991. On July 29, 1991, the trial court's ruling was journalized.

Dillner filed a timely notice of appeal. The case was transferred to this court pursuant to K.S.A. 20-3018(c).

The legislature enacted K.S.A. 1991 Supp. 20-164, which authorizes this court to establish by rule an expedited judicial process for, among other things, modification of child support orders. Pursuant to K.S.A. 1991 Supp. 20-164, this court adopted Supreme Court Rule 172 (1991 Kan. Ct. R. Annot. 131), which states in pertinent part:

> "(a) The administrative judge in each district shall provide for an expedited judicial process which will increase effectiveness in support, visitation, and parentage proceedings by appointing one

or more judges or court trustees to preside as hearing of officers at summary hearings relating to the establishment, modification, or enforcement of [child] support....

"(b) The hearing officer is authorized to:

(1) Take testimony and prepare written findings of fact and conclusions of law which shall constitute the summary record.

(2) Evaluate evidence and decide the most expeditious manner either to establish or to enforce court orders.

. . . . .

(5) Enter orders, including default orders, as necessary; orders proposed by court trustees shall be approved by a judge before the order is issued.

"(c) District and associate district judges, district magistrate judges, and court trustees shall be considered qualified to serve as hearing officers at expedited judicial process hearings.

. . . . .

> "(g) Decisions of district magistrate judges or court trustees appointed pursuant to this rule shall be subject to review by an associate district judge or district judge on the motion of any party filed within 10 days after the order was entered."

The District Court of Shawnee County established the following procedures, pursuant to local Rule 3.401.

> 8. (a) Expedited Judicial Process. Pursuant to K.S.A. 20-164 and Kansas Supreme Court Rule No. 172 ..., a deputy court trustee shall be appointed by the Administrative Judge and designated as the hearing officer for summary hearings relating to the establishment, modification or enforcement of child support orders and visitation rights. The hearing officer shall be vested with all of the authority and shall be subject to the limitations of Rule 172.
>
> . . . . .
>
> "(c) Hearing Officer Powers. Matters cognizable by the hearing officer shall include motions to establish or modify child support . . . .
>
> . . . . .

> "(g) Judicial Review. All orders issued by the hearing officer shall be subject to judicial review on the written motion of any party filed within ten (10) days after the order is filed with the clerk. If no motion is filed within ten (10) days objecting to the hearing officer's order, it shall be deemed a final order of the district court."

Additionally, in December 1990, Shawnee County announced the development of Family Law Guidelines. They provide, in pertinent part:

> "4. POST JUDGMENT MOTIONS TO MODIFY CHILD SUPPORT
>
> A. Administrative Hearing Officer. All post judgment motions requesting modification of child support orders are assigned for hearing to the Administrative Hearing Officer. See District Court Rule 3.401(8).
>
> . . . . .
>
> C. Procedure Before the Administrative Hearing Officer.
>
> . . . . .

(4) Hearings before the Administrative Hearing Officer are informal in nature and generally are expected to last about one-half hour. Any counsel anticipating a more lengthy hearing should advise the District Court Trustee's office when a hearing time is requested.

. . . . .

D. Judicial Review. Either party shall have ten (10) days from the filing of the order of the Administrative Hearing Office to file a Motion for Judicial Review. The District Judge assigned to domestic matters will review the Administrative Hearing Officer's decision and may affirm the decision or grant a re-hearing on the motion before a District Judge."

Although not applicable to this case, the 1992 Family Law Guidelines include the following changes and additions that are applicable to future cases.

"4.05 Stenographic Record.

A stenographic record is not provided in proceedings before the AHO. The record will consist of the Hearing officer's findings, order and any exhibits presented. If counsel wish a stenographic record of the proceedings before the Hearing Officer, they should retain a court reporter.

"4.06 Judicial Review.

Either party shall have ten (10) days from the filing of the order of the Administrative Hearing Officer to file a Motion for Judicial Review. The District Judge assigned to domestic matters will review the Administrative Hearing Officer's decision and may affirm the, decision by denying the appeal, grant oral argument or a re-hearing before a District Judge. Evidence and issues not presented to the Hearing Officer will not be considered by the Court on appeal. The District Court Trustee's Office will send notice to the parties of the District Judge's denial or hearing setting on Motions for Judicial Review.

> All Motions for Judicial Review should be accompanied by a memorandum which sets forth the claimed error of the AHO. This memorandum is a very important step in appealing the AHO decision as oral argument or re-hearing is frequently denied, absent a statement showing good cause."

Dillner argues it is unconstitutional to deny litigants sufficient time to present all relevant evidence, including past divorce and support matters, to a trial judge, with an official record of the proceeding taken. The essence of her argument is that the trial court unconstitutionally delegated the authority to an AHO to hear child support modification motions, in the form of an expedited judicial process, without providing for a trial de novo at the

trial court level. Dillner does not address whether her constitutional challenge is to K.S.A. 1991 Supp. 20-164, Supreme Court Rule 172, or Shawnee County's local rules. Because K.S.A. 1991 Supp. 20-164 is the enabling legislation for the expedited judicial process, Dillner's challenge will be addressed in terms of challenging the constitutionality of a statute.

Before Dillner's constitutional challenge is examined on its merits, Soden's argument that Dillner raised the issue for the first time on appeal is addressed. The parties dispute whether the constitutional issue was raised in the trial court.

The AHO's notes stated, "[Dillner] wants noted that [s]he believes this hearing [is] a violation of due process because [of] no opportunity for de novo review". The petition for judicial

review did not raise any constitutional issues. In defense, Dillner contends "it would not be necessary to raise these issues if de novo due process review on the record were provided." Dillner also raised the due process and remedy by due course of law issues to the trial judge in oral argument held on June 26, 1991. The issue presented in the trial brief was, "May the Court, in a domestic relations action, unreasonably limit the time in which a litigant has to present his case?"

In the context of constitutional questions raised for the first time on appeal, this court has held:

> "'The constitutionality of a statute should be considered in any action where it is necessary in order to determine the merits of the action or where the issues cannot be intelligently decided without doing so, notwithstanding the failure of the parties to raise the constitutional question, failure to plead the question,

> or failure to present the question to the trial court.', [Citation omitted.]" *Van Sickle v. Shanahan*, 212 Kan 426, 434, 511 P.2d 223 (1973).

See also *In re Conservatorship of Marcotte*, 243 Kan. 190, 196, 756 P.2d 1091 (1988) (three exceptions to the general rule that issues raised for the first time on appeal will not be reviewed).

It is necessary for the resolution of this case to address the constitutional questions. The issues cannot be decided without doing so. Dillner did raise some of the constitutional issues before the trial court, although not with the clarity and effort made on appeal.

Dillner cites numerous cases, both from Kansas and from other jurisdictions, in an attempt to bolster the merits of her constitutional challenge. For example, Dillner cites cases in which the

Court of Appeals reversed a trial court's refusal to allow a full hearing on motions to reconsider or to modify child custody. See *In re Marriage of Blagg*, 13 Kan. App. 2d 530, 775 P.2d 190 (1989); *Anhalt v. Fesler*, 6 Kan. App. 2d 921, 636 P.2d 224 (1981); *Rosenberg v. Rosenberg*, 6 Kan. App. 2d 882, 636 P.2d 200 (1981), *rev. denied* 231 Kan. 801 (1982). We have examined the cases. They deal with abuse of discretion issues and are not applicable to the case at hand.

Dillner states that this court has not directly addressed whether the expedited judicial process is constitutional; however, she suggests the following Supreme Court cases provide guidance.

In *Slavenberg v. Bautts*, 221 Kan. 590, Syl ¶ 1, 561 P.2d 423 (1977), the trial court refused to grant a recess to allow an absent witness the opportunity

to testify. The trial court did not want any delay because only four days had been scheduled for the trial and numerous other cases were waiting to be tried. This court held that "[a] trial court has the inherent authority to control its docket to eliminate procrastination and delay in order to expedite the orderly flow of business, but the power is not absolute and should be exercised with sound discretion." Based upon the facts of the case, this court found the trial court's refusal to delay the trial an abuse of discretion.

In *Callan v. Biermann*, 194 Kan. 219, Syl ¶ 1, 398 P.2d 355 (1965), and *Boucher v. Roberts*, 187 Kan. 675, Syl ¶ 3, 359 P.2d 830 (1961), this court held:

> "Each party has the absolute right to have his cause argued by counsel before the decision is rendered, whether it is tried to the court or a jury. However, in order to predicate

> error upon the refusal of the court to allow argument, it must appear that counsel has not waived the right by silence or acquiescence. The record should affirmatively show that permission to argue was refused."

Dillner does not demonstrate the applicability of these cases to her argument. These cases are easily distinguishable. They are basically abuse of discretion cases. Here, we have a constitutional challenge to a statute authorizing an expedited judicial hearing that does not provide for a de novo trial by the trial court. These cases provide no guidance for the question at hand.

Dillner's specific allegations of unconstitutionality are that the trial court's delegation of power to an AHO to hear child support modification motions without providing for a de novo trial at the trial court level is a violation of remedy by due course of law, due process,

and equal protection. Dillner's constitutional challenge must be viewed in light of the following principles:

> "The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution."
>
> "A statute is not to be invalidated by the judicial arm of government if the challenged statute does not contravene significant constitutional or inherent rights of individuals, the classification on which it is based is reasonable, it is within the scope of the police powers of the State, and it is appropriately related to the proper purpose of such police power". *State v. Risjord*, 249 Kan. 497, Syl ¶ 1, 2, 819 P.2d 638 (1991).

Section 18 of the Kansas Constitution Bill of Rights provides for remedy by due course of law:

> "All persons, for injuries suffered in person, reputation or property, shall have remedy by

> due course of law, and justice administered without delay. "

"Remedy by due course of law," as used in § 18 of the Kansas Bill of Rights, means the reparation for injury ordered by a tribunal having jurisdiction in due course of procedure after a fair hearing. *Harrison v. Long*, 241 Kan. 174, 179, 734 P.2d 1155 (1987). Remedy by due course of law is tied to due process concerns.

> "Over the years, the court has allowed the legislature to modify remedies when required by public policy. [Citation omitted.] However, . . . the court looks to insure that due process requirements are met and, when a common-law remedy is modified or abolished, an adequate substitute remedy must be provided to replace it." *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 346-47, 757 P.2d 251 (1988).

Dillner does not discuss any of the Kansas cases applying § 18. Instead, she asserts two other states have found that

a similar procedure violated their equivalent of remedy by due course of law. See *Eberly v. Eberly*, 489 A.2d 433 (Del. 1985); *Drennen v. Drennen*, 229 Neb. 204, 426 N.W.2d 252 (1988).

In *Eberly*, the Supreme Court of Delaware concluded "it was an abuse of discretion and a denial of the husband's due process rights to have awarded extended interim alimony to the wife without any evidentiary hearing." 498 A.2d at 436.

This case is easily distinguishable from the case at hand. *Eberly*, unlike here, involved the trial court ruling upon the wife's motion for interim relief "without any hearing, notice to the husband's counsel, or explanation." 498 A.2d at 438. Here, there was notice and a hearing before the AHO. *Eberly* also did not involve an expedited judicial process before an AHO.

In *Drennen*, the Supreme Court of Nebraska held that the Referee Act violated the remedy by due course of law provision of the state constitution. The Act stated that the child support referee in certain cases "shall" decide, among other things, all child support modification matters. The court reasoned:

> "The Legislature may not limit the constitutionally granted original jurisdiction of the district court . . . .
>
> "The grant of exclusive and original jurisdiction to the referee denies the persons chargeable with potential or delinquent child support obligations access to the district court as an original trier of fact. 229 Neb. at 216.

Although there are similarities between *Drennen* and the case at hand, there also are differences. For example, the Nebraska Referee Act differs from the expedited judicial process statute in

Kansas. The Kansas statute is simply the enabling legislation; the procedures have been established by the Supreme Court and local rules. Furthermore, if the system currently in place in a district is effective, the district may not be required to establish an expedited process. See Supreme Court Rule 172(a). The Nebraska Act required the referee to determine all motions to modify child support. The Kansas procedure does not require an AHO or a court trustee to hear all child support modification matters. District, associate, and magistrate judges also may serve as hearing officers. Supreme Court Rule 172(c). *Drennan* is thus distinguished from the case at hand.

Dillner also alleges a due process violation. The Fourteenth Amendment of the United States Constitution prohibits a state from depriving "any person of

life, liberty, or property, without due process of law." In addressing due process concerns, this court has held:

> "Basic elements of procedural due process of law are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. [Citation omitted.]" *Peck v. University Residence Committee of Kansas State Univ.*, 248 Kan. 450, 467, 807 P.2d 652 (1991).
>
> "The test for whether due process has been afforded is whether the legislation has a real and substantial relation to the objective sought, whether it is reasonable in relation to the subject, and whether it was adopted in the interest of the community." *State ex rel. Stephan v. Smith*, 242 Kan. 336, Syl ¶. 10, 747 P.2d 816 (1987).
>
> "[T]he Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed rights[s]." [Citation omitted]'" *Harrison v. Long*, 241 Kan. at 179.

Dillner contends that she has been denied due process because the expedited judicial process in Shawnee County does not provide for a de novo trial at the trial court level. She claims she was denied the "opportunity to be heard before a judge with a right to call witnesses and introduce evidence at meaningful times and in a meaningful manner and to cross-examine opposing witnesses, all with a record for appeal." Dillner does not allege a problem with the notice given. Again, Dillner cites numerous cases from other jurisdictions, which can be distinguished from the instant case. See, e.g., *Jordan v. Jordan*, 653 S.W.2d 356, 358 (Tex. App. 1983) (divorce procedure, which did not allow parties to call witnesses, violated due process).

Soden responds that neither party was denied due process. Both parties had

the right to be heard before the AHO, to call and cross-examine witnesses" and to introduce evidence. Soden states that neither party requested a record of the proceeding before the AHO. Soden contends Dillner did not attempt to present the testimony of Soden's boss during the AHO proceeding; she waited until petitioning the trial court for judicial review.

"The concept of due process is flexible in that 'not all situations calling for procedural safeguards call for the same kind of procedure.'" *In re Petition of City of Overland Park for Annexation of Land*, 241 Kan. 365, 370, 736 P.2d 923 (1987); see *Darling v. Kansas Water Office*, 245 Kan. 45, 50, 774 P.2d 941 (1989). The due process protections offered in an expedited judicial process and other court proceedings may differ. That does not mean the expedited judicial

process inherently violates due process.

Dillner claims she was denied due process because she was denied a de novo trial at the trial court level. She does not claim she was denied the opportunity for a full and meaningful hearing before the AHO. There is nothing in K.S.A. 1991 Supp. 20-164, Supreme Court 172, or Shawnee County's local rules restricting the number of witnesses or the type of evidence that can be presented to the AHO. Although Shawnee County's Family Law Guidelines suggest hearings before the AHO usually will last one-half hour, the guidelines state that a party anticipating a longer hearing should notify the Trustee's Office in advance. Hearings can and do last more than one-half hour. The guidelines are not court rules and are not binding upon the court. Furthermore, the AHO's notes for this hearing include a reference to an

extensive hearing" and "2 depositions and numerous submitted documents."

What Dillner wanted was a second chance to try her case. She was not denied due process. She received notice, a reasonable hearing, and judicial review.

Dillner's equal protection argument is that unlike other counties in Kansas, Shawnee County does not provide for a hearing on the record. Dillner's premise for arguing that she was denied a hearing is that she was, denied a de novo trial at the trial court level. Her premise is faulty--she had a hearing before the AHO.

The hearing before the AHO, however, was not on the record. There was no official court recording or reporting of the hearing taken. Soden claims, and Dillner does not dispute, that Dillner never raised the issue of an official court transcription of the hearing to the

AHO or to the trial court.

Having concluded that the expedited judicial procedure challenged by Dillner is constitutional, we hold that judicial review on the record is required. It thus follows that either an electronic or court reporter record must be requested at the hearing or the right to object to the lack of a record being made is waived.

Here, Dillner cannot show prejudice because the testimony before the AHO was by deposition and exhibits, all of which were available to the trial court. The only evidence that Dillner did not get before the trial court was testimony of Soden's boss, which the trial court considered irrelevant. The witness' testimony was not offered in the hearing before the AHO; thus, it was not part of the record. The trial court did not err in refusing to hear testimony that could

have been presented to the AHO.

Dillner also maintains the expedited judicial process, as conducted in Shawnee County, fails to meet federal mandates required by Title IV of the Social Security Act, which concerns grants to states for aid and services to needy families with children and for child welfare services. 42 U.S.C. § 666(a)(2) (1988) requires states to establish expedited processes to obtain and enforce child support orders. Expedited processes are defined as "administrative or expedited judicial processes or both which increases effectiveness . . . and under which the presiding officer is not a judge of the court." 45 C.F.R. § 303.101(a) (1991). The federal government requires that the expedited processes safeguard the due process rights of the parties and ensure the opportunity for judicial review according

to the state's procedures. 45 C.F.R. § 303.101(c)(2), (6) (1991). The presiding officer takes testimony and establishes a record. 45 C.F.R. § 303.101(d)(1) (1991).

Dillner contends that taking testimony and establishing a record mean the hearing must be a hearing on the record. Dillner's support for this contention is a secondary authority, not the federal government.

Dillner also cites several other states in which a de novo trial at the trial court level is provided for statutorily in expedited judicial processes.

The expedited judicial process in Kansas does not contravene the federal requirements and guidelines. Because there is no conflict between federal law and the expedited judicial process, Dillner's argument fails.

Dillner's final argument is that the trial court erred in affirming the reduction of Soden's child support obligation.

The standard of review for a trial court's affirmance of an AHO's order reducing child support is the same as the standard of review for a trial court's modification of child support: abuse of discretion. See *In re Marriage of Schletzbaum*, 15 Kan. App. 2d 504, 809 P.2d 1251 (1991) (citing *Thompson v. Thompson*, 205 Kan. 630, 631, 470 P.2d 787 [1970]). "Judicial discretion is abused when judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.' *Stayton v. Stayton*, 211 Kan 560, 562, 506 P.2d 1172 (1973)." 15 Kan. App. 2d at 505.

The trial court's letter decision

stated the court considered the record and the arguments made at the hearing on the petition for judicial review. The record included depositions, numerous domestic relations affidavits, child support worksheets, tax returns, financial records, employment earning statements, and medical records. The court affirmed the AHO order except for the effective date of the order.

The AHO estimated Soden's average monthly gross income at $3,000 and imputed Dillner's average monthly gross income at $700. The AHO noted that Soden was dropping from a 72-hour work week to a 40-hour work-week, drastically decreasing his salary and that Dillner was unable to do secretarial work because of carpal tunnel syndrome. Mention is made of one child with orthodontic braces.

Dillner contends the trial court abused its discretion by ignoring

evidence of the circumstances of the divorce, of the circumstances surrounding the parties' entering into the property agreement, and of Soden's history of working 72 hours per week to provide for his family. She maintains the trial court abused its discretion by relying solely upon Soden's current income and in finding Soden's motives in reducing his number of work hours were irrelevant.

Additionally, Dillner claims she would not have entered into the property agreement if she had not thought its provisions, including child support, were final. She fails to consider that child support provisions included in a property or settlement agreement are not binding. See K.S.A. 1991 Supp. 60-1610(b)(3). Child support orders "may be reopened, changed, or modified as the children grow and their needs change, the economy changes, the parents move, remarry,

change jobs change their way of life, succeed, and fail.' *Hill v. Hill*, 228 Kan. 680, 685, 620 P.2d 1114 (1980).

Dillner argues that Soden should not be able to be deliberately "underemployed with impunity, regardless of motivation." Dillner's premise is faulty. Soden is not underemployed. He reduced his work week from 72 hours to 40 hours. Soden raises the question of whether Dillner is underemployed, working 20 hours a week during the school year. The AHO considered the parties' salaries and the number of hours worked each week. This information was in the record before the trial court. In its letter decision, the trial court stated:

> "The Shawnee County Family Law Guidelines provide 'When. calculating domestic gross income for a salaried person, the salary figure to be used is the current salary being paid.' The previous year's income should only be used if the

income fluctuates and it is necessary to approximate an income figure., [Citation omitted.] In the usual case a wage earner[']s current earnings are the best gauge of future earnings. In this case the petitioner worked two jobs and overtime. He has decided to quit working more than a 40 hour week.

"The Court does not feel that it is particularly relevant whether this decision is due to personal or medical reasons. The Court is not inclined to order a parent to work more than a normal 40 hour week unless it is necessary to make adequate provision for the needs of the minor children. While earnings from all sources are to be considered when setting child support, the Court is unaware of any guideline, statute or case law which supports the proposition that the parents should be ordered to work more than 40 hours per week when an adequate support order can be made out of the base salary. Under the guidelines, the parental child support obligation of [Soden] is $910.00 for his three children....This is in excess of $300.00 per child and, in addition, [Soden] was ordered to pay 81% of the children's uninsured medical care. While (Dillner] and the children would surely enjoy more, this

> is not an inadequate level of support. [Soden's] standard of living will also decline."

Dillner maintains that both parents should be heard in a motion to modify child support. Both parents were present, and represented by counsel, at the hearing before the AHO and at the hearing on the petition for judicial review. Both parents were heard. The trial court did not abuse its discretion.

Soden files a timely cross-appeal, contending the AHO erred in accepting as evidence Dillner's exhibits that had not been provided to Soden prior to the hearing, which Soden maintains is contrary to Shawnee County Guidelines, and the parties' depositions. Soden does not brief the issue. "An issue not briefed or argued upon appeal is deemed abandoned." *State v. Smith*, 245 Kan. 381, Syl ¶ 6,

781 P.2d 666 (1989). Therefore, this court will not address the issue.

Both parties request attorney fees on appeal. Dillner's appeal is far from frivolous. Having the authority to assess attorney fees, this court has considered the motions filed by both attorneys and has concluded that each party should pay his or her own attorney fees.

Affirmed.

Robert E. Keeshan
HAMILTON, PETERSON, TIPTON
& KEESHAN
1206 WEST TENTH STREET
TOPEKA, KANSAS 66604
(913) 233-1903

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
Division 12

In the Matter of the Marriage of

RICHARD A. SODEN
and CASE NO. 89-D-325
CONNIE B. SODEN
now CONNIE B. DILLNER

ORDER

NOW on this 29th day of July, 1991, comes on for decision the Court's reconsideration of the Administrative Hearing Officer's decision for support in the above entitled matter. Petitioner appears in person and by Christel E. Marquardt of Palmer & Marquardt; Respondent appears in person and by Robert Keeshan.

After consideration of the evidence, pleadings, and arguments of counsel, the Court finds as follows:

1. Child support shall be $863 per month.

2. Petitioner shall provide health insurance for the parties' minor children and shall pay 81% of the uninsured medical costs.

3. Both parties are to provide the other with a quarterly statement of all earnings no later than the 15th of the month following each quarter, beginning on July 15th.

4. Petitioner is ordered to pay $950 of the previously paid medical bills to the Respondent. Counsel are requested to work out an arrangement for the payment. If no arrangement can be reached, the Court will issue an order relative to the payment.

5. The modification of child support ordered herein is effective for the payment due beginning with the June, 1991 payment.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED, that the previous findings of the Court are the order of the Court.

/s/

JUDGE OF THE DISTRICT COURT

/s/

Christel E. Marquardt
Supreme Court Reg. #8316
PALMER & MARQUARDT
112 S.W. 6th, Suite 102
Topeka, Kansas 66603-3862
(913) 233-1836
Attorney for Petitioner

Approved as to Form

/s/

Robert E. Keeshan, #08795
HAMILTON, PETERSON, TIPTON
& KEESHAN
1205 W. 10TH
TOPEKA, KANSAS 66604
(913) 233-1903
Attorney for Respondent

IN THE THIRD JUDICIAL DISTRICT COURT
OF KANSAS, DIVISION. 12
SHAWNEE COUNTY, SITTING AT TOPEKA

IN THE MATTER OF THE MARRIAGE OF:)
)
RICHARD A. SODEN)
PETITIONER/PLAINTIFF,)
and/vs.)
CONNIE B. SODEN)
RESPONDENT/DEFENDANT.)

CASE NO. 89-D-325

ORDER ON MOTION FOR JUDICIAL REVIEW

To (Petitioner) (Respondent):

The Court has reviewed the Administrative Hearing Officer's recommended order and finds that the motion for a judicial review should be:

____ Denied. Reason.

_____
_____
_____.

X Granted: The parties are notified that the Judicial Hearing on the above cited Trustee Order is set for 26th day of June, 1991, in Division 12 courtroom at 3:45 PM. All parties are advised to be present or represented.

Court has scheduled 30 minutes for argument on appeal. No evidence not presented to A.H.O. will be considered.

/s/
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

A copy of the Order on Motion for Judicial Review cited above, and the Motion for Judicial Review filed 5/24/, 1991 herein, was mailed or delivered to the following:

Connie B. Dillner, Last known address
Robert E. Keeshan, Atty for respondent; 1206 W. 10th, Topeka, KS 66604
Richard Soden, RR #1, Box 0505, Maple Hill, KS 66507; Christel E. Marquardt, Atty for Petitioner; 112 SW 6th St., Suite 102, Topeka, KS 66603

on this 30th day of May, 1991.

/s/
District Court Trustee/
Deputy
Shawnee County Courthouse
200 SE 7th Ave., Room 207
Topeka, Kansas 66603-3969
(913) 291-4090

IN THE SHAWNEE COUNTY DISTRICT COURT OF KANSAS
SITTING AT TOPEKA, DIVISION XII

IN THE MATTER OF THE MARRIAGE OF/OR:)
)
RICHARD A. SODEN)
PETITIONER/PLAINTIFF,)
and/vs.)
CONNIE B. SODEN)
RESPONDENT/DEFENDANT.)

CASE NO. 89-D-325

ADMINISTRATIVE HEARING OFFICER ORDER

NOW on this 16th day of April, 1991, the petitioner's motion to decrease the Petitioner's child support obligation comes on for hearing. The petitioner appears in person and/or by counsel, C. Marquardt. The respondent appears in person and/or by counsel B. Keeshan. The District Court Trustee appears by ----, and on behalf of the assigned interests of the Kansas State Department of Social and Rehabilitation Services, hereinafter the SRS.

The Administrative Hearing Officer upon reviewing the Court file and the

evidence admitted, and hearing the testimony presented and arguments of any appearing counsel makes the following findings of fact:

1. The Petitioner's average monthly gross income is $3,000 (estimated) and the respondent's average monthly gross income is $700 (imputed).

"TITLE TO REAL ESTATE INVOLVED"

2. The circumstances and special needs of the parties are as follows:

Petitioner: is dropping from 72 hr work week to 40 hr work week and thus salary will drastically decrease.

Respondent: unable to do secretarial work due to carpal tunnel;

and child(ren): 1 child with braces

3. That there is (is not) a substantial change in circumstances which warrants a child support obligation modification herein;

4. The petitioner's (respondent's) child support obligation should be

set at $862 per mo. effective 5-5, 1991, of which $862 per mo. is for current support and $0 per 0 is to be applied on the arrearage;

5. The attached mandatory supplemental orders required by Shawnee County District Court Rule 3.401 are hereby incorporated herein by reference;

6. That any existing Income Withholding Order in this case should be ordered modified per the above finding 4. amounts; and

7. All future unreimbursed medical expenses shall be shared proportionately. The party incurring the expense shall notify the other party asap and send copy of bill to be paid within 30 days of receipt. Paying party shall pay the bill (his/her proportion) within 30 days of receipt of it from incurring party.

8. The tax exemption for the middle child shall be taken by the Respondent. The Petitioner shall take the other two exemptions.

/s/ (5-9-91)
JANE E. LINDHOUT
ADMINISTRATIVE HEARING
OFFICER

NOTICE OF JUDICIAL REVIEW PROCEDURE

YOU ARE HEREBY notified that the foregoing Administrative Hearing Officer order is subject to the approval by a Judge of the District Court and that it shall become a final judgment of the District Court unless either party requests in writing a judicial hearing within 10 days of its filing by the District Court Trustee.

CERTIFICATE OF MAILING

The foregoing order was mailed or delivered to the following: Connie B. Dillner, Respondent, at her last known address; Richard A. Soden, Petitioner, P. O. Box 0505, Maple Hill, KS 66507; Christel E. Marquardt, Attorney for petitioner; 112 SW 6th St., Suite 102,

Topeka, KS 66603 and Robert E. Keeshan, Attorney for respondent; 1206 W. 10th, Topeka, KS 66604 on this 15 day of May, 1991.

/s/
JANE E. LINDHOUT
ADMINISTRATIVE
HEARING OFFICER
Shawnee County
Courthouse, Room 305
200 S.E. 7th Ave.
Topeka, Kansas 66603-
3969
(913) 291-4078

Case No. 89-D-325 Date 4-16-91

MANDATORY SUPPLEMENTAL ORDERS

The following mandatory supplemental orders pertaining to enforcement of child support are incorporated in the foregoing order and are made a part thereof pursuant to the Shawnee County District Court Rule #3.401:

IT IS FURTHER ORDERED that all child support and maintenance payments shall be paid to the Clerk of the District Court. Any payments of child support not made in accordance with this provisions shall be presumptively disallowed. Any payments made payable to the obligee may be endorsed and cashed by the Clerk of the District Court.

IT IS FURTHER ORDERED that the Office of the District Court Trustee shall monitor and enforce the payments of support ordered herein and may pursue on behalf of any child all civil remedies available to the obligee to enforce payments of child support.

IT IS FURTHER ORDERED that each party shall inform the District Court Trustee in writing of any change of name, residence, and employer including business address within seven (7) days after such change.

IT IS FURTHER ORDERED that withholding of income to enforce this order of support shall take effect under the law of Kansas if there is an

arrearage in an amount equal to or greater than the amount of support payable for one month.

The amount of child support payable per month in this case is $862 due on or before the 5th day of each month. The payments in this case are to be made monthly.

The residence, business address, home and business telephone numbers and social security number of each party shall be included in any final order of support or maintenance, unless this information is otherwise available in the court file.

/s/ (5/9/91)
JANE E. LINDHOUT
Administrative Hearing Officer

IN THE THIRD JUDICIAL DISTRICT
COURT, SHAWNEE COUNTY, KANSAS

IN THE MATTER OF THE MARRIAGE OF:)
)
RICHARD A. SODEN)
PETITIONER/PLAINTIFF,)
and/vs.)
CONNIE B. SODEN)
RESPONDENT/DEFENDANT.)

CASE NO. 89-D-325

CHILD SUPPORT WORKSHEET

	Petitioner	Respondent
A. INCOME COMPUTATION - WAGE EARNER	3000(est)	700* imputed
B. INCOME COMPUTATION- SELF-EMPLOYED		
1. Self-Employment Gross Income	_____	_____
2. Reasonable Business Expenses (-)	_____	_____
3. Domestic Gross Income (insert on Line C.1. below)	_____	_____
C. ADJUSTMENTS TO DOMESTIC GROSS INCOME		
1. Domestic Gross Income	_____	_____

2. Court-Ordered Child Support Paid	(-)	_____	_____
3. Court-Ordered Maintenance Paid	(-)	_____	_____
4. Court-Ordered Maintenance Received	(+)	_____	_____
5. CHILD SUPPORT INCOME (Insert on Line D.1 below)		_____	_____

D. COMPUTATION OF CHILD SUPPORT

1. Child Support Income	3,000	+	700	
		=	3,700	
2. Proportionate Shares of Combined Income (Each parent's income divided by combined income)	81.1 %		18.9 %	

3. Basic Child Support Obligation (Using combined income from Line D.1., find amount for each child and enter total for all children)

Age of Children	0-6	7-15	16-18
Number Per-Age Category	_____	2(339)	1
Total Amount	_____	678	396
		= 1074	

4. Health and Dental Insurance Premium	48	+	_____

= 48

5. Work-Related Child Care Costs _____ + _____

= _____

6. Parents' Total child support Obligation (Line D.3. plus Lines D.4. & D.5) 1122

7. Parental Child Support Obligation (Line D.2. for each parent) 910 212

8. Adjustment for Insurance and Child Care (Subtract for actual payment made for items D.4. and D.5.) (-) 48 -

9. Net Parental Child Support Obligation (Line D.7. minus Line D.8.; Insert on Line F.1. below) 862 212

E. CHILD SUPPORT ADJUSTMENTS

CONSIDERED N/A		CATEGORY	AMOUNT ALLOWED PETITIONER	RESPONDENT
1. x	x	Long Dist. Visitation Costs	____	____
2. x	x	Time spent w/Noncustodial	____	____
3. x	x	Income Tax Exemption Ptake2	____	____
4. x	x	Special Needs Rtake1	____	____
5. x	x	Agreement Past		

6.	x	x	Minority Cost-of-Living Differ.	____	____
7.	x	x	Residence w/Third party	____	____
8.	x	x	Overall Financial Condition	____	____
				____	____

9. TOTAL
(Insert on Line F.2 below) _____ ____

F. DEVIATION(S) FROM REBUTTAL PRESUMPTION AMOUNT

1.	Net Parental Child Support Obligation (Line D.9. from above)	862	212
2.	Total Child Support Adjustments (Line E.9. from above)	--	--
3.	Adjusted Child Support Obligation	862	212

DATE: 4/16/91 _____/s/_____(signed JANE E. LINDHOUT 5-9-91)
Administrative Hearing Officer

CASE NUMBER: 89-D-325
DATE: 4-16-91

(R) Wants noted that he believes this hearing a violation of due process because no opportunity for de novo review - so noted.

ADMINISTRATIVE HEARING OFFICER'S NOTES: After an extensive hearing and wading through 2 depositions and numerous submitted documents, the AHO finds that the issues are: (1) income of both parties (2) health insurance payment (3) tax exemptions (4) both parties financial condition. The AHO concludes as follows: (1) (P)'s new salary will be approx. $3,000/mo according to documents submitted by (P); (R) earnings approximately $600+ as a school bus driver - minimum wages would be imputed at $737 - farm income is impossible to determine at this time, so an imputed amount of $700 was used for (R). (2) (P) carries health insurance and has prior to his marriage when his new wife was added to his family plan. $48.00 granted for ins. premium. (3) The tax computations from counsel indicate it would be inappropriate

/s/
JANE E. LINDHOUT
ADMINISTRATIVE HEARING OFFICER

for (P) to have all the exemptions or to split them equally. Therefore, AHO orders the tax exemption for the middle child to be taken by the (R) rather than adding to his (P)s child support obligation since he is claiming a difficult financial situation. (4) both parties claim financial difficulties but each are

of their own making and since the divorce. AHO finds it would not be in the best interests of the children to either reduce or increase the c/s ordered due to overall financial condition.

SUPREME COURT ORDER
DISTRI CASE NO. 89D325

IN THE SUPREME COURT
OF THE STATE OF KANSAS

ROBERT E KEESHAN
HAMILTON PETERSON TIPTON &
KEESHAN
1206 W 10TH ST
TOPEKA KS 66604-1291

IN THE MATTER OF THE MARRIAGE OF
RICHARD A. SODEN, APPELLEE, NO.
91-67023-AS
AND
CONNIE B. SODEN (NOW CONNIE B.
DILLNER), APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING BY APPELLANT, CONNIE DILLNER.
DENIED.

DATE: 07/10/92.

CAROL G. GREEN

CLERK

Federal Child Support Regulations

45 C.F.R. §303.101(a) *Definition.* "Expedited processes" means administrative or expedited judicial processes or both which increases effectiveness and meet processing times specified in paragraph (b)(2) of this section and under which the presiding officer is not a judge of the court.

. . . .

45 C.F.R. § 303.101(b)(4) *Basic Requirement.*

(4) If a case involves complex issues requiring judicial resolution, the State must establish a temporary support obligation under expedited processes and may then refer the unresolved issues to the full judicial system for resolution.

. . . .

45 C.F.R. § 303.101(c) *Safeguards.* Under expedited processes:

. . . .

(2) the due process rights of the parties involved must be protected.

. . . .

(6) action taken may be reviewed under the State's generally applicable judicial procedures.

45 C.F.R. § 303.101(d) *Functions.*

The functions performed by presiding officers under expedited processes must include at minimum:

. . . .

(1) taking testimony and establishing a record.

K.S.A. (1991 supp.) 20-164

Rules establishing expedited process for support and child visitation orders.

(a) The supreme court shall establish by rule an expedited judicial process which shall be used in the establishment, modification and enforcement of orders of support pursuant

to.....K.S.A. 60-1610, and amendments thereto...

K.S.A 20-302b

(c) In accordance with the limitations and procedures prescribed by law, and subject to any rules of the supreme court relating thereto, any appeal permitted to be taken from an order or final decision of a district magistrate judge shall be tried and determined *de novo* by a district judge, except that in civil cases where a record was made of the action or proceeding before the district magistrate judge, the appeal shall be tried and determined on the record by a district judge.

K.S.A. 60-104
Act by court or judge.

Without regard to whether the word "court" or the word "judge" is used in

any provisions of this chapter, all trials upon the merits shall be conducted in open court and in a regular courtroom if reasonably possible. All other acts or proceedings, including the entry of a ruling or judgement, may be done or conducted by a judge or judge pro tem in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one *ex parte*, shall be conducted outside the district without the consent of all parties affected thereby who are not in default.

K.S.A. 60-243 Evidence.

(a) *Form and admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by this article...

Kansas Supreme Court Rule 172

(a) The administrative judge in each district shall provide for an expedited judicial process which will increase effectiveness in support, visitation and parentage proceedings by appointing one or more judges or court trustees to preside as hearing officers at summary hearings relating to the establishment, modification, or enforcement of support pursuant to the Kansas Parentage Act . . . and enforcement of parent visitation rights.

. . .

(g) Decisions of district magistrate judges or court trustees appointed pursuant to this rule shall be subject to review by an associate district judge or district judge on the motion of any party filed within 10 days after the order was entered.

Shawnee County Local Rule 3.401(8)

(a) Expedited Judicial Process. . . A deputy court trustee shall be appointed by the Administrative Judge and designated as the hearing officer for summary hearings relative to the establishment, modification or enforcement of child support orders and visitation rights. The hearing officer shall be vested with all of the authority and shall be subject to the limitations of Rule 172.

. . .

(c) Hearing Officer Powers. Matters cognizable by the hearing officer shall include motions to establish or modify child support. . . .

(g) Judicial Review. All orders issued by the hearing officer shall be subject to judicial review on the written motion of any party filed within ten (10) days after the order is filed with the

clerk. If no motion is filed within ten (10) days objecting to the hearing officer's order, it shall be deemed a final order of the district court.

Shawnee County Family Guidelines

4(D.) Judicial Review. Either party shall have ten (10) days from the filing of the order of the administrative hearing officer to file a Motion for Judicial Review. The District Judge assigned to domestic matters will review the Administrative Hearing Officer's decision and may affirm the decision or grant a re-hearing on the motion before a District Judge. . . .

Shawnee County Family Guidelines Revised

4.05 Stenographic Record.

A stenographic record is not provided in proceedings before the AHO.

The record will consist of the Hearing officer's findings, order and any exhibits presented. If counsel wish a stenographic record of the proceedings before the Hearing Officer, they should retain a court reporter.

4.06 Judicial Review.

Either party shall have ten (10) days from the filing of the order of the Administrative Hearing Officer to file a Motion for Judicial Review. The District Judge assigned to domestic matters will review the Administrative Hearing Officer's decision and may affirm the, decision by denying the appeal, grant oral argument or a re-hearing before a District Judge. Evidence and issues not presented to the Hearing Officer will not be considered by the Court on appeal. The District Court Trustee's Office will send notice to the parties of the

District Judge's denial or hearing setting on Motions for Judicial Review.
All Motions for Judicial Review should be accompanied by a memorandum which sets forth the claimed error of the AHO. This memorandum is a very important step in appealing the AHO decision as oral argument or re-hearing is frequently denied, absent a statement showing good cause.

Supreme Court, U.S.
FILED
NOV 12 1992
OFFICE OF THE CLERK

No. 92-636

In The
Supreme Court Of The United States

October Term, 1992

CONNIE B. DILLNER,
Petitioner,

v.

RICHARD A. SODEN,
Respondent.

Petition For Writ of Certiorari
To The Supreme Court Of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

Christel E. Marquardt
LEVY AND CRAIG, P.C.
911 Main Street
Suite 2000
Kansas City, MO 64106
(816) 474-8181

Counsel for Respondent

QUESTIONS PRESENTED

The Kansas Expedited Child Support Enforcement Statutes authorize the promulgation of rules for the enforcement and modification of child support orders. The questions presented are:

1. Does due process allow the State of Kansas to delegate to an Administrative Hearing Officer full power to hear or decide child support controversies without providing litigants either recording or transcribing the hearing for appeal purposes?

2. If so, can the State of Kansas deny **de novo** review of such decisions by a judge, as is allowed other civil litigants?

3. May the State of Kansas require child support litigants to pay for court reporters when all other civil litigants are not required?

PARTIES TO THE PROCEEDING

The parties set forth in Petitioner's Brief are accurate.

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No. 92-636

In The
Supreme Court Of The United States

October Term, 1992

CONNIE B. DILLNER,
Petitioner,

v.

RICHARD A. SODEN,
Respondent.

Petition For Writ of Certiorari To
The Supreme Court Of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions as cited by Petitioner are accurate.

SERVICE ON RESPONDENT

Respondent received service of Petitioner's Petition for Writ of Certiorari by United States mail on October 20, 1992. This Brief in Opposition is filed within the statutory 30 days allowed.

PETITIONER'S APPENDIX DOCUMENTS

Petitioner's Appendix on page b7 included the Administrative Hearing Officer's (AHO) Order, however, she failed to note in paragraph 3 that the AHO crossed out (is not). The AHO found a substantial change in circumstances that warranted a child support obligation modification.

Additionally, Petitioner included Shawnee County Family Law Guidelines 4(D.), 4.05 and 4.06. Guidelines 4.05 and 4.06 were not adopted at the time of the Soden hearing and are not applicable to these proceedings. There was no requirement that a litigant pay for a court reporter if the litigant wanted a transcript.

This mandates that the third question raised by Petitioner be denied.

JURISDICTION

There are no inconsistent decisions that would confer jurisdiction on this court. There was no deprivation of due process, and no deprivation of equal protection to Petitioner at the AHO hearing.

STATEMENT OF THE CASE

The parties to this action were divorced on May 26, 1989. Mr. Soden filed a Motion for Modification of Child Support on February 1, 1991.

A hearing on the Motion was held before the Administrative Hearing Officer (AHO) on April 16, 1991 pursuant to the Kansas Expedited Judicial Process (Kansas Supreme Court Rule 172 and Shawnee County Rule 3.401 on pp. d5-d7 of Petitioner's Brief); the Order was entered on May 15, 1991. In the AHO's handwritten notes from the hearing, she stated: "After an

extensive hearing and wading through 2 depositions and numerous submitted documents, the AHO finds...." (Appendix A). The Order reduced child support to $862 per month commencing May 5, 1991.

Petitioner filed a Petition for Judicial Review on May 24, 1991. The Judicial Review was heard on June 26, 1991. Judge Buchele issued a letter decision on June 28, 1991, which was journalized by Order filed July 29, 1991. Judge Buchele's Order affirmed the AHO Order, however, the date of payment was modified to commence June 5, 1991.

From this judgment, Petitioner appealed the matter to the Kansas Supreme Court where the lower court's decision was affirmed on May 22, 1992. It is from the Kansas Supreme Court decision that Petitioner comes to this Court.

RESPONSE TO PETITIONER'S FACTS

Petitioner Dillner has submitted an inaccurate, incomplete account of the facts.

The majority of the alleged facts Petitioner enumerated in her brief are not accurate, however, since most predate the divorce, Mr. Soden will not use his valuable briefing for those items, or other facts not related to the Expedited Judicial Process, as they should have no bearing on this proceeding.

Mr. Soden never threatened to quit his employment for six months as alleged on page 11 of Petitioner's Brief. All allegations as to what Mr. Hunter would have said (Vol. I, p. 178) are completely false. (Petitioner's Brief p. 13)

Petitioner's legal issues have changed at every level to which she has appealed.

She did not claim that delegation of authority to the AHO was unconstitutional. She did not allege that the expedited process was unconstitutional.

The first time Petitioner raised as error the issue of the delegation of authority to the

AHO for child support decisions was in her Docketing Statement in her Appeal to the Kansas Supreme Court.

In her Kansas Supreme Court Brief Petitioner listed her appeal issues as:

> I. The trial court unconstitutionally delegated the full power to hear the child support controversy to an Administrative Hearing Officer, denying remedy by due course of law, due process and equal protection
>
> II. The trial court improperly limited Respondent's time to present witnesses

In her Kansas Supreme Court Reply Brief she raised the issue of:

> Improper Limitation Of
> Respondent's Witnesses

Now, Petitioner focuses on the lack of a court reporter's transcript. She asks this court to grant her a writ of certiorari to determine:

> Whether the expedited Child Support Enforcement Procedures instituted by the State of Kansas and the Third Judicial District (Shawnee County) violate the Fourteenth Amendment to the United States Constitution.
>
> and

> Whether due process requires a hearing on the record without request or a **de novo** review by regular judicial procedures before child support due from one spouse to another can be reduced. (Brief pp.4-5)

On page 5 of her Brief, Petitioner quotes K.S.A. 20-164 (1991 Supp.). It should be noted that subsection (g) does not have the word "shall" underlined in the text of the rule.

K.S.A. 20-302b which is quoted by Petitioner (Brief pp. 6, 44), is a statute entitled **"District magistrate judges; jurisdiction, powers and duties; appeals."** This statute has no relevance to the procedures established by the Court for an expedited judicial process in child support matters, it does not pertain to administrative hearing officers, it only covers the district magistrate judges.

The child support was not set at $582.00 (Petitioner's Brief, p. 8), it was set at $862.00.

Petitioner references Vol. II of the transcript to support portions of her Petition using quotes from it as facts. Volume II is a transcript of counsels' arguments before Judge Buchele, it is not evidence.

Petitioner also cites Vol. I, pp. 197-201 which is an Affidavit she attached to her Trial Brief filed with the Court AFTER the June 26, 1991, hearing before Judge Buchele. There was no opportunity to cross-examine her concerning these statements. The Affidavit was admitted over objection. Neither of these should be accepted as facts. Petitioner also cites her deposition that was admitted AFTER she gave testimony in open court. The deposition was admitted over Mr. Soden's objection.

APPEAL

The general rule for appeals is that a reviewing court will not consider an

issue that is not raised below (Johnson v. Kan. Neurological Inst., 240 Kan. 123, 126, 727 P.2d 912 (1986)). An appeal is necessarily limited to the questions from which an appeal is taken (McCarty v. Kansas-Nebraska Natural Gas Co., 270 Kan. 386, 271 P.2d 264 (1954)) and if the question was not raised in the first instance when it could have bene raised, it is deemed waived.

Respondent understands that in constitutional questions, there is a right of appeal if the United States Constitution has been abridged, however, it has not been abridged; Petitioner should be precluded from pursuing these issues.

RESPONDENT'S FACTS

1. The parties were divorced on May 26, 1989. Three children were born to this marriage:

Jason, 9-3-74
Mitchell, 2-8-77
John, 6-11-79

2. At the time of the divorce, Mr. Soden was ordered to pay child support of $1,350.00.

8. The Motion to Modify was heard by the AHO on April 16, 1991, under the Kansas Supreme Court Rule 172, Expedited Judicial Process.

4. Kansas Supreme Court Rule 172 provides for an Expedited Judicial Process in child support modification. The rule specifies that a record be made, it does not require that the record be a court reporter's transcript.

5. Both parties received notice of the AHO hearing, and were allowed to present all the witnesses and evidence they desired. Both parties were aware of the expedited procedure and neither objected to the AHO hearing the matter.

6. The AHO made a record of the hearing (Appendix b attached to Petitioner's Brief, Appendix A) which set

support at $862.00 per month.

7. Appellant's counsel verbally objected to the District Court at the end of the hearing that she was not allowed a **de novo** review from the AHO hearing (Vol. I, p. 341).

8. In her District Court Trial Brief Petitioner stated only that she wanted to present non-cumulative witnesses and wanted to present a full closing argument. Petitioner did not raise the constitutionality of the expedited process, nor the AHO's authority to try the case (Vol. I, 175-183).

9. The issue of delegation of authority to the AHO to hear and decide child support cases was first raised by Petitioner in her Docketing Statement for her appeal to the Kansas Supreme Court.

REASONS FOR DENYING THE WRIT

I. Other State Court Decisions

There is no reoccurring question with far-reaching impact presented in this case. The Kansas rule does not mirror another state's rule, however, it does follow the federal government mandate (45 C.F.R. §303.101) for protecting due process rights of the parties. It is immaterial whether other states provide "much more due process safeguards than Kansas" as alleged in Petitioner's Brief p. 20.

The Kansas Court has decided no question of federal law which conflicts with other state court decisions.

II. Due Process

A fundamental requirement of due process is an opportunity to be heard (US v. Eufracio-Torres, 890 F.2d 266, cert. den. 100 S.Ct. 1306 (1989), Joe Self Chevrolet, Inc. v. Board of County Com'rs

of Sedgwick County, 247 Kan. 625, 802 P.2d 1231 (1990)) at a meaningful time in a meaningful manner.

The due process clause only protects vested rights (Harrison By and Through Harrison v. Long, 241 Kan. 174, 734 P.2d 1155, appeal dismissed 108 S.Ct. 50 (1987)). Child support not due and owing is not a vested right.

All of the Supreme Court cases cited in Petitioner's brief support the requirement of "some form of hearing" "at a meaningful time and in a meaningful manner." Respondent does not dispute this proposition.

The AHO's handwritten notes from the hearing state... "After an extensive hearing and wading through 2 depositions and numerous submitted documents, the AHO finds..." (Appendix A) There can be no doubt that the Petitioner had a hearing at

a meaningful time and in a meaningful manner.

Due process does not guarantee a particular form of hearing, and does not even require an oral hearing (In re A.H. Robins Co., Inc., 107 F.R.D. 2 (1985).

Due process does not require that a court reporter's transcript be made at each hearing. There was no prohibition to the Petitioner requesting that a court reporter record the hearing, as is often done with other domestic motions. There is no explanation as to why she did not request such a record either before, or during the AHO hearing.

Both parties had notice; notice is not the issue here. Petitioner could have requested more time for the hearing before the AHO; she did not.

She is asking this court to grant her an order to allow her to retry her case. She had her day (and days) in court.

Petitioner had a fair hearing before the AHO, she presented all of the evidence that she wanted, even some admitted over the objection of Mr. Soden.

Mr. Soden agrees that the court has established an expedited process to take care of the extremely crowded docket in domestic matters. Supreme Court Rule 172 authorizes the hearing officer to:

> (1) Take testimony and prepare written findings of fact and conclusions of law which shall constitute the summary record. (Rule 172 (b)(1).)

Judge Lindhout prepared written findings and conclusions (Vol. I, 92-97, Petitioner's Appendix b).

The rules do not require a transcript be made of each proceeding, however there is no bar to a request for a transcript.

None of the cases cited by Appellant deals with the issue of a post divorce child support modification, except

Drennen. None of the cases she cited is an appeal from an AHO child support order.

The Drennen case (Drennen v. Drennen, 229 Neb. 204, 426 N.W.2d 252 [1988]) cited by Appellant is distinguishable in many respects. It was a IV-D paternity and child support case. Under Nebraska law, a referee determines the issues only if it is a IV-D case. The statute in Nebraska did not allow the referee to decide child support where IV-D is not involved. The court held the law unconstitutional because of an equal protection violation. The IV-D program applicants in Nebraska were treated differently from applicants not in the IV-D program. All litigants under Kansas' expedited procedure are afforded notice and opportunity to be heard; they have the right to call witnesses, cross-examine witnesses, and present evidence.

At the district court hearing, Mr. Keeshan stated to the court (Vol. II, page 2, lines 18-19), "I'm not sure if the court desires evidence or argument." After the court stated that it was interested in argument, Mr. Keeshan then stated, " . . . we have a procedure which in Shawnee County differs from a lot of other states in that we don't have what we consider, at least from the respondent's viewpoint, is an adequate opportunity to review the case." Questioning the adequacy of the opportunity to review the case, does not raise a constitutional question about the AHO hearing.

III. Equal Protection

It is impossible to determine what fundamental rights Petitioner was denied. She never explains why she did not request a court reporter at the AHO hearing.

Equal protection under the 14th Amendment to the United States

Constitution guarantees only that distinctions be drawn in such a manner as to bear a rational relationship to a legitimate state purpose. A violation occurs when the state treats someone differently who is similarly situated (Jacobs, Visconsi & Jacobs, Co., 927 F.2d 1111, 9th Cir. (1991)).

The mere fact that a statute applies to one person and not another does not constitute a denial of equal protection.

Where the statute challenged does not abridge a fundamental right and does not impose a suspect classification, then the rational relationship to governmental interest is examined (U.S. v. Doyan, 909 F.2d 412, 9th Cir. (1990)).

Since the Kansas Expedited Judicial Process has not been shown to abridge a fundamental right (liberty or vested property right) and does not impose a suspect classification (such as race,

religion or alienage), then the relationship to governmental interest should be examined.

There is a governmental interest in having support modification motions heard in a timely manner. The expedited process accomplishes that goal.

A **de novo** hearing is not allowed all other litigants. The child support procedure is unique, however it does not violate due process, nor equal protection.

The payment for court reporters by litigants should not be a question for determination here since the Guideline was not in effect at the time the Soden hearing occurred.

Should a party be guaranteed a second chance after not presenting their entire case the first time? No. Mrs. Dillner had every opportunity to present all the evidence she wanted to before the AHO. She had every opportunity to request

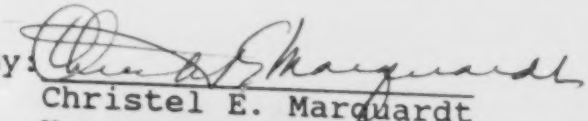
a transcript which she did not do. There was no rule in effect that would have required her to pay for the transcript.

45 C.F.R. §303.101(d)(1) states that testimony should be taken and a record established. In 45 C.F.R. §303.101(c)(2) it mandates that due process rights should be protected and in subsection (6) the parties have the right of review. All due process rights and equal protections were granted Petitioner.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

By: 

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APPENDIX A

"CASE NUMBER: 89 D 325
DATE; 4-16-91

ADMINISTRATIVE HEARING OFFICER'S NOTES;

R wants noted that he believes this hearing a violation of due process because no opportunity for de novo review. So noted. After an extensive hearing and wading through 2 depositions and numerous submitted documents, the AHO finds that the issues are: 1. income of both parties 2. Health insurance payment 3. tax exemptions 4. both parties financial condition. The AHO concludes as follows: 1. P's new salary will be approx. $3000/mo according to documents submitted by P; R earns approx $600+ as a school bus driver - minimum wage would be imputed at $737 - farm income is impossible to determine at this time, as an imputed amount of $700 was used for R. 2. R carries health insurance and has prior to his marriage when his new wife was added to his family plan. $48.00 granted for ins. premium. 3. The tax computations from counsel indicate it would be inappropriate for the P to have all the exemptions or to split them equally. Therefore, AHO orders the tax exemption for the middle child to be taken by the R rather than adding to P's child support obligation since he is claiming a difficult financial situation. 4. both parties claim financial difficulties but each are of their own making and since the divorce. AHO finds it would not be in the best interests of the children to either reduce or increase the c/s ordered due to overall financial condition.

Jane E. Lindhout/s/
JANE E. LINDHOUT
ADMINISTRATIVE HEARING OFFICER"